

84-667

Supreme Court, U.S.

FILED

OCT 25 1984

ALEXANDER L. STEVENS,

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

HAROLD TRAVIS LYONS,

Petitioner,

VS.

WARDEN, NEVADA STATE PRISON,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI FROM THE
SUPREME COURT OF THE STATE OF NEVADA**

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26P8



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Supreme Court of the United States
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HAROLD TRAVIS LYONS,

Petitioner,

vs.

WARDEN, NEVADA STATE PRISON,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI FROM THE
SUPREME COURT OF THE STATE OF NEVADA**

QUESTIONS PRESENTED FOR REVIEW

1. Were Lyons' pleas of guilty rendered involuntary by virtue of ineffective assistance of counsel.
2. Was Lyons denied due process and his pleas of guilty rendered involuntary by virtue of the State's filing of a supplemental information charging him with being an habitual criminal three days before his trial was scheduled to begin.

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OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 100 Nev. Ad. Op. 90 and _____ P.2d _____ (1984) (App. A, *infra*, pp. 1a-3a).

The trial court's order making the writ of habeas corpus for post conviction relief permanent, dated July 7, 1983 (App. B, *infra*, pp. 4a-5a) was not published.

JURISDICTION

The decision of the Nevada Supreme Court which is sought to be reviewed was filed with the Clerk of the Nevada Supreme Court on July 3, 1984.

The order of the Nevada Supreme Court denying Lyons' request for a rehearing was filed with the Clerk of the Nevada Supreme Court on August 27, 1984.

Nevada Supreme Court Justice Springer's order staying the issuance of the remittitur from the Nevada Supreme Court for a period of 30 days was filed with the Clerk of the Nevada Supreme Court on September 20, 1984.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Were Lyons' pleas of guilty rendered involuntary by virtue of ineffective assistance of counsel.
2. Was Lyons denied due process and his pleas of guilty rendered involuntary by virtue of the State's filing of a supplemental information charging him with being an habitual

criminal three days before his trial was scheduled to begin.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourth Amendment to the United States Constitution provides:

Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the United States Constitution provides, in pertinent part:

... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

3. The Sixth Amendment to the United States Constitution provides:

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

4. The Seventh Amendment to the United States Constitution provides:

Trial by jury in civil cases. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

5. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

... nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

6. Nevada Revised Statute 207.010. (App. C, *infra*, p. 6a).

7. Nevada Revised Statute 465.080. (App. D, *infra*, p 7a).

8. Nevada Revised Statute 465.101. (App. E, *infra*, p. 8a).

STATEMENT OF THE CASE

Status

Lyons is petitioning this Court for a writ of certiorari to review the decision of the Nevada Supreme Court reversing the trial court's decision granting his post conviction petition for writ of habeas corpus.

On December 1, 1980, Lyons plead *nolo contendere* to one count of slot cheating under NRS 465.080(2)(b) and one count of attempted slot cheating in the case styled *State of Nevada v. Harold Travis Lyons and Dawn Elise Cobeen*, No. C79-1480 (hereinafter referred to as the "MGM Hotel case"). On March 2, 1982, Lyons plead *nolo contendere* to one count of possession of a slot machine cheating device under NRS 465.080(3)(a) in the case styled *State of Nevada*

v. *Harold Travis Lyons*, No. C82-0334 (hereinafter referred to as the "Sahara Hotel case").

On June 6, 1982, Lyons filed a post conviction petition for writ of habeas corpus in the Eighth Judicial District Court of the State of Nevada. (ROA, pp. 1-37). Lyons was incarcerated in the Nevada State Prison at the time. In his petition, Lyons sought to vacate his pleas of guilty in the MGM and Sahara Hotel cases on the grounds that they were involuntarily entered. The trial court ruled in Lyons' favor and permanently granted the writ of habeas corpus.

The State of Nevada appealed the trial court's decision. On July 3, 1984 the Nevada Supreme Court reversed the trial court's decision and reinstated Lyons' pleas of *nolo contendere*.

On August 27, 1984, the Nevada Supreme Court issued its order denying Lyons' petition for rehearing. On September 20, 1984, Nevada Supreme Court Justice Springer stayed the issuance of the remittitur to the trial court for a period of thirty days pending application to this Court for a writ of certiorari.

THE FACTS

Lyons was playing a slot machine in the MGM Grand Hotel and Casino in Reno, Nevada, when he was forcibly detained by private hotel security guards pursuant to the authority of NRS 465.101. He was handcuffed and taken to a room removed from the main casino. Lyons was then interrogated at length by MGM Grand security officer Bill Bailey regarding his alleged cheating activities. During the interrogation, Lyons and Bailey were alone in the room, and Lyons was made to sit with his hands handcuffed behind his

back. Bailey had been employed as a police officer for approximately 30 years.

When Lyons asked Bailey whether he was under arrest, Bailey replied that he was not. Lyons requested that he be allowed to contact an attorney. Bailey denied this request. Lyons told Bailey that he should either arrest him or let him go. Bailey ignored the statement and continued his interrogation.

Some time later, a Nevada state gaming agent arrived and ordered that Lyons be strip searched. Lyons refused and was threatened with physical violence if he did not comply. Based upon this threat, Lyons removed his clothes and Bailey and the agent searched through Lyons' clothing, personal belongings, and wallet. Bailey claims that he found slot cheating devices on Lyons' person.

On September 19, 1979, Lyons was indicted on one count of slot cheating under NRS 465.080(2)(b), and one count of possession of a slot machine cheating device under NRS 465.080(3)(a) in the MGM Hotel case. On July 9, 1980, Lyons retained Kent Robison, Esq., to represent him in that case, and the case was set for trial on December 1, 1980.

On Friday, November 28, 1980, the State filed an information supplemental to the indictment charging Lyons with being an habitual criminal under NRS 207.010. Lyons first learned of the supplemental information on Monday, December 1, 1980, approximately 30 minutes before he was scheduled to appear in court to begin his trial. Robison told Lyons that if he insisted on going to trial and was found guilty, he would be sentenced to life in prison without the possibility of parole. Robison further indicated to Lyons that he had no chance of winning his trial because the State had too much evidence against him. In reliance on these representations, Lyons entered pleas of *nolo contendere* to the charge of slot

cheating contained in Count I of the indictment, and to a charge of attempted slot cheating, a lesser included offense to the charge of possession of a slot cheating device contained in Count II of the indictment. Pursuant to negotiations, the State agreed not to pursue the habitual criminal charge.

On January 22, 1981, Lyons was arrested at the Sahara-Reno Hotel in Reno, Nevada, and charged with one count of possession of a slot cheating device and one count of conspiracy to commit slot cheating. In February of 1982, Chester Kafchinski, Esq., was appointed by the Court to represent Lyons on both the MGM and Sahara Hotel cases, and Robison withdrew as Lyons' counsel in the MGM case. Lyons subsequently entered a plea of *nolo contendere* to a charge of possession of a slot machine cheating device in the Sahara Hotel case as a result of threats by the prosecutor to charge him as an habitual criminal in that case as well.

On June 6, 1982, Lyons filed a proper person post conviction petition for writ of habeas corpus in the Eighth Judicial District Court in the State of Nevada. (ROA, pp. 1-37). In his petition, Lyons raised the issues raised in the instant petition, to wit: that his pleas of *nolo contendere* in both the MGM and Sahara Hotel cases were rendered involuntary by ineffective assistance of counsel. Specifically, he claimed that his pleas were entered in reliance on incomplete and erroneous advice from his attorneys. See *Herring v. Estelle*, 491 F.2d 125, *rehrg denied*, 493 F.2d 664 (5th Cir. 1974). He also alleged that said pleas were rendered involuntary by virtue of the prosecution's last minute filing of the supplemental information charging him with being an habitual criminal.

With regard to the first issue, Lyons charged that his attorneys failed to provide him effective assistance of counsel because they did not file a motion to suppress the evidence

allegedly seized by Bailey during his strip search at the MGM Hotel. Lyons contended in his original petition and subsequent supplemental points and authorities filed with the trial court (ROA, pp. 266, 304, 218-222) that Bailey was acting under color of state law as a *quasi* police officer and thus was required to adhere to the mandates of the Fourth Amendment with regard to searches and seizures. See *People v. Zelinski*, 594 P.2d 1000 (Cal. 1979), and *United States v. Dansberry*, 500 F.Supp. 140 (D.C. Ill. 1980). In supplemental points and authorities filed with the trial court on August 11, 1982, it is stated:

The Petitioner asserts that his plea was involuntary because it was the product of ineffective assistance of counsel. As stated above, the ineffectiveness is predicated upon the counsel's failure to investigate the Petitioner's case and file motions to suppress illegal [sic] seized evidence.

The claim that trial counsel was ineffective because he failed to pursue Fourth Amendment defenses has been found to be within the parameters of habeas relief.

Moran v. Morris, 478 F.Supp. 145 (1979).

(ROA, p. 222). Lyons also raised this issue on appeal to the Nevada Supreme Court.

Lyons also contended that the assistance of his attorneys was ineffective on the grounds that he was wrongfully advised to plead guilty to duplicitous offenses in the MGM case. During oral argument before the trial court, Lyons argued that under the facts of his case, the charge contained in Count II of the indictment in the MGM case was a lesser included offense of the charge contained in Count I. (ROA, pp. 314-315). Specifically, Lyons was charged with slot cheating in Count I, and possession of a slot machine cheating device in Count II. Because both charges arose out of the same transaction, Lyons could only have been convicted of one of the

two offenses enumerated.¹ Because Lyons' attorneys failed to realize that he could have been convicted of only one of these offenses, he was wrongfully advised by (1) Robison to plead guilty to two offenses in the MGM case, and (2) Kafchinski not to withdraw said pleas as part of the Sahara Hotel case negotiations.

In its opinion reversing the decision of the trial court making the writ permanent, the Nevada Supreme Court simply stated that the assistance that Lyons' attorneys provided him was not ineffective under either the traditional "farce and sham" or the modern "reasonably effective assistance" standards. The Court also held Robison was not ineffective for failing to file a motion to suppress evidence. The Court did concede, however, that Lyons was entitled to argue that his pleas were rendered involuntary on the grounds that they were the product of ineffective assistance of counsel.

The other issue which is raised in the instant petition is whether Lyons' was denied due process and his pleas of *nolo contendere* rendered involuntary by virtue of the State's last minute filing of the supplemental information charging him with being an habitual criminal. This issue was raised in Lyons' original petition for writ of habeas corpus. (ROA, pp. 25-34). The issue was also addressed in supplemental points and authorities (ROA, pp. 275-280), and before the Nevada Supreme Court. The Nevada Supreme Court held that Lyons was not denied due process and that his pleas of *nolo contendere* were not rendered involuntary by virtue of the State's filing of the habitual criminal allegation three days before trial.

¹Nevada follows the more liberal double jeopardy analysis under *Blockburger v. United States*, 284 U.S. 299 (1932), whereby the factual circumstances of the charges are taken into account in determining what is a lesser included offense. *Owen v. State*, 680 P.2d 593 (Nev. 1984).

REASONS FOR GRANTING THE WRIT

INEFFECTIVE ASSISTANCE OF COUNSEL

The petition for writ of certiorari should be granted with respect to the issue of ineffective assistance of counsel for the following reasons. First, the Nevada Supreme Court's decision is in conflict with the decision of the Eighth Circuit Court of Appeals in *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976), *cert. denied* 434 U.S. 844 (1977), wherein the court held that the failure of defense counsel to file a pretrial motion to suppress evidence constituted ineffective assistance of counsel. Second, the Nevada Supreme Court failed to set forth any reasons in support of its holding that Lyons' counsel failure to file a pretrial motion to suppress in the MGM case and to advise him that the charge contained in Count II of the indictment in that case was a lesser included offense of the charge contained in Count I did not constitute ineffective assistance of counsel. It is submitted that the Court should have at least analyzed Lyons' claim with reference to the five factors enumerated in *United States v. Cronic*, _____ U.S. _____ (1984). Third, review of the Nevada Supreme Court's decision is necessary to avoid a gross miscarriage of justice in this case.

THE HABITUAL CRIMINAL CHARGE

The Court should grant the petition with regard to this issue to reassess its holding in *Bordenkircher v. Hayes*, 434 U.S. 357 (1970). It is submitted that the Court's holding in *Bordenkircher* has sanctioned wide spread prosecutorial abuse in plea bargaining by encouraging prosecutors to file habitual

criminal cases when the severity or staleness of the prior offenses do not warrant such a charge simply to cause defendants to forego their fundamental right to trial by jury. For this reason, it is submitted that the holding of *Bordenkircher* should be re-evaluated, and a limited exception to prosecutorial discretion be created when dealing with unwarranted habitual criminal charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the issues presented herein should be resolved by review on a writ of certiorari.

Respectfully submitted,

/s/ JOHN J. MOMOT

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEVADA

WARDEN, NEVADA STATE PRISON,
Appellant

vs.

HAROLD TRAVIS LYONS,
Respondent.

No. 15084

July 3, 1984

Appeal from order granting post-conviction petition for
writ of habeas corpus, Eighth Judicial District Court, Clark
County; Joseph S. Pavlikowski, Judge.

Reversed.

Brian McKay, Attorney General, Carson City, and
Steven B. Wolfson, Deputy Attorney General, Las Vegas,
for Appellant.

John J. Momot, Las Vegas, for Respondent.

OPINION

Per Curiam:

The warden appeals from an order granting a post-conviction petition for writ of habeas corpus. The order declared void *ab initio* pleas of *nolo contendere* entered by respondent in two Washoe County criminal prosecutions. For the reasons set forth below, we reverse the order granting the petition and reinstate the pleas.

On December 1, 1980, respondent pleaded *nolo contendere* to one count each of slot machine and attempted possession of a cheating device, in a case involving events which transpired at the MGM Grand casino. Before sentencing, he was arrested for cheating offenses at the Sahara-Reno. Respondent left the state and was not located and returned until January of 1982. In subsequent proceedings he was sentenced in the MGM matter consistent with the original plea bargain, and was allowed to plead *nolo contendere* to another cheating offense in the Sahara case. He was sentenced to ten years and five years, concurrent, in the former matter, and to a concurrent five years in the latter.

In June of 1982, respondent filed the instant petition for habeas relief, challenging the validity of his pleas in the MGM case.¹ The petition contended that respondent had pleaded without the effective assistance of counsel, and that his pleas had been "coerced" by the "use" of illegally seized evidence and by the filing of an habitual criminal allegation the Friday before trial. In supplemental points and authori-

¹The district court determined that respondent had shown "good cause" why his petition should be entertained notwithstanding his failure to appeal from the judgments of conviction. *See Junior v. Warden*, 91 Nev. 111, 532 P.2d 1037 (1975). The "good cause" finding is not at issue on appeal, and we express no opinion thereon.

ties, respondent raised the additional claim that both his MGM and his Sahara-Reno pleas were invalid under *Hanley v. State*, 97 Nev. 130, 624 P.2d 1387 (1981). The district court concluded that respondent's pleas were "not properly taken" and granted the habeas petition, declaring the pleas void *ab initio* "for the reasons and on the grounds set forth" in the petition and supplemental points and authorities.

The warden now argues that there was no factual or legal basis for the grant of habeas relief. We agree.

Respondent argued below that his MGM pleas were "coerced" and obtained in violation of due process by the state's filing of an habitual criminal allegation three days before trial. He argues that such a practice is unequivocal evidence of prosecutorial vindictiveness triggered by a defendant's refusal to plead and the concomitant assertion of the constitutional right to a trial. The United States Supreme Court, however, has approved this practice and held that a prosecutor may file an habitual criminal allegation in response to an accused's election not to plead guilty. The Court specifically indicated that absent a decision to file the allegation based on an arbitrary factor such as race, an inference of vindictiveness is not compelling in light of the give-and-take of the plea bargaining process and the prosecutor's power to have filed the allegation at the outset of the plea negotiations. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). We have embraced the *Bordenkircher* analysis under facts fairly similar to those of this case. *See Schmidt v. State*, 94 Nev. 665, 584 P.2d 695 (1978). Moreover, respondent gave no indication of any feeling of coercion at the MGM plea canvass, and told the court he was entering his pleas freely and voluntarily and without compulsion. Accordingly, we conclude that the prosecutor's conduct in this case

did not violate respondent's due process rights or result in involuntary pleas.²

Respondent also argued below that his MGM pleas were "coerced" by the "use" of illegally seized evidence. By entering his *nolo* pleas, however, respondent waived all constitutional claims based on events occurring prior to the entry of the pleas, except those involving the voluntariness of the pleas themselves. *See Cline v. State*, 90 Nev. 17, 518 P.2d 159 (1974). Accordingly, his fourth amendment claim was not cognizable on his petition for habeas relief.

Respondent also argued below that his attorney in the MGM proceeding did not provide effective assistance in advising him to forego trial and plead *nolo contendere*. The United States Supreme Court has recently adopted the "reasonably effective assistance" standard for ineffective counsel in criminal cases. This constitutional standard supplants Nevada's traditional "farce and sham" test. *See Strickland v. Washington*, _____ U.S. _____, 52 U.S.L.W. 4565 (May 14, 1984). It is not entirely clear whether the *Strickland* case applies prospectively only, or to cases still pending on direct appeal. In any event, we have examined the various claims of ineffectiveness and have concluded that counsel was not ineffective under either the traditional "farce and sham" or the modern "reasonably effective assistance" standard.³

²In his answering brief, respondent relies on *State v. Sather*, 564 P.2d 1306 (Mont. 1977), which disapproves of the filing of an habitual criminal allegation under circumstances similar to those of this case. *Sather* relied heavily on *Hayes v. Cowan*, 547 F.2d 42 (6th Cir. 1976), which was overruled in *Bordenkircher*. *Sather* is of doubtful validity in the wake of the *Bordenkircher* ruling.

³In particular, we note that counsel was not ineffective for failing to file a motion to suppress. Although respondent's substantive fourth amend-

We have considered the argument that the *nolo* pleas violated the rule of Hanley v. State, *supra*, and have found the argument meritless.

Having concluded that the record before us shows no factual or legal basis for the grant of habeas relief, we hereby reverse the order granting the post-conviction petition for writ of habeas corpus, and we hereby reinstate respondent's pleas of *nolo contendere*.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

ment claim was not cognizable on his petition for post-conviction habeas, he was entitled to argue, as he did, that counsel was ineffective for failing to seek suppression. We have concluded, however, that notwithstanding decisions from other jurisdictions, the motion would have been without merit under federal and Nevada law. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); Radkus v. State, 90 Nev. 406, 528 P.2d 697 (1974).

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

HAROLD TRAVIS LYONS,)
Petitioner,)
v.) No. C58393
THE STATE OF NEVADA, et. al.,)
Respondents.)

ORDER GRANTING WRIT OF HABEAS CORPUS
FOR POST-CONVICTION RELIEF

This matter having come before this court for a final hearing on June 14, 1983, and the court having considered the evidence and testimony taken hereto along with all the pleadings filed in this cause and the arguments of counsel, does hereby FIND:

That the pleas of guilty entered into by Petitioner in cases number C79-1480 on December 1, 1980 and C82-334 on March 2, 1982 pursuant to plea negotiations, as well as the plea negotiations themselves, are void ab initio for the reasons and on the grounds set forth in the Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities filed with this court on June 9, 1982, as well as all supplemental points and authorities filed by Petitioner subsequent thereto, and all oral argument presented to the court.

Accordingly, the court does hereby ORDER that the Petitioner's application for a Writ of Habeas Corpus for Post-Conviction Relief is granted and hereby made permanent.

It is further ORDERED that counsel for respondents shall

see that Petitioner is transferred to Northern Nevada Correctional Center so that proceedings consistent with this order can be undertaken in Washoe County, Nevada.

DATED this 7 day of July, 1983.

/s/ Joseph S. Pavlikowski

JOSEPH PAVLIKOWSKI
District Judge

HABITUAL CRIMINALS

207.010 Habitual criminals: Definition; punishment; trial of primary offense.

1. Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who has previously been twice convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been three times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state prison for not less than 10 years nor more than 20 years.

2. Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

3. Conviction under this section operates only to increase, not to reduce, the sentence otherwise provided by law for the principal crime.

4. It is within the discretion of the district attorney whether or not to include a count under this section in any information, and the trial judge may, at his discretion, dismiss a count under this section which is included in any indictment or information.

5. In proceedings under this section, each previous conviction must be alleged in the accusatory pleading charging the primary offense, but no such conviction may be alluded to on trial of the primary offense, nor may any allegation of the conviction be read in the presence of a jury trying the offense.

6. If a defendant charged under this section is found guilty of, or pleads guilty to, the primary offense, but denies any previous conviction charged, the court shall determine the issue of the previous conviction after hearing all relevant evidence presented on the issue by the prosecution and the defendant. The court shall impose sentence pursuant to subsections 1 and 2 of this section upon finding that the defendant has suffered previous convictions sufficient to support an adjudication of habitual criminality.

7. Nothing in this section limits the prosecution in introducing evidence of prior convictions for purposes of impeachment.

8. A certified copy of a felony conviction is prima facie evidence of conviction of a prior felony.

[1911 C&P §27; RL §6292; NCL §9976]—(NRS A 1961, 446; 1965, 250; 1967, 217, 516; 1971, 173; 1977, 360; 1981, 1647)

465.080 Unlawful use of counterfeit or unapproved chips, tokens or unlawful coins, devices; unlawful possession of devices.

1. It is unlawful for any licensee, employee or other person

to use counterfeit chips in a gambling game.

2. It is unlawful for any person, in playing or using any gambling game designed to be played with, receive or be operated by chips or tokens approved by the state gaming control board or by lawful coin of the United States of America:

(a) Knowingly to use other than chips or tokens approved by the state gaming control board or lawful coin, legal tender of the United States of America, or to use coin not of the same denomination as the coin intended to be used in that gambling game; or

(b) To use any device or means to violate the provisions of this chapter.

3. It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his employment within such establishment, to have on his person or in his possession any device intended to be used to violate the provisions of this chapter.

4. It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his employment within such establishment, to have on his person or in his possession while on the premises of any licensed gaming establishment any key or device known to have been designed for the purpose of and suitable for opening, entering or affecting the operation of any gambling game, drop box or any electronic or mechanical device connected thereto, or for removing money or other contents therefrom.

5. Possession of more than one of the devices described in this section permits a rebuttable inference that the possessor intended to use them for cheating.

[1:239:1951; A 1955, 13] + [2:239:1951]—(NRS A 1965, 1467; 1967, 588; 1973, 445; 1977, 475; 1979, 1477; 1981, 1293)

465.101 Detention and questioning of person suspected of violating chapter; limitation of liability; posted notice required.

1. Any licensee, or his officers, employees or agents may question any person in his establishment suspected of violating any of the provisions of this chapter. No licensee or any of his officers, employees or agents is criminally or civilly liable:

- (a) On account of any such questioning; or
- (b) For reporting to the state gaming control board or law enforcement authorities the person suspected of the violation.

2. Any licensee or any of his officers, employees or agents who has probable cause for believing that there has been a violation of this chapter in his establishment by any person may take that person into custody and detain him in the establishment in a reasonable manner and for a reasonable length of time. Such a taking into custody and detention does not render the licensee or his officers, employees or agents criminally or civilly liable unless it is established by clear and convincing evidence that the taking into custody and detention are unreasonable under all the circumstances.

3. No licensee or his officers, employees or agents are entitled to the immunity from liability provided for in subsection 2 unless there is displayed in a conspicuous place in his establishment a notice in boldface type clearly legible and in substantially this form:

Any gaming licensee, or any of his officers, employees or agents who has probable cause for believing that any person has violated any provision of chapter 465 of NRS prohibiting cheating in gaming may detain that person in the establishment.

(Added to NRS by 1971, 580; A 1973, 446; 1981, 1295; 1983, 564)

MAR 9 1985

ALEXANDER L STEVENS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD TRAVIS LYONS,

Petitioner,

v.

WARDEN, NEVADA STATE PRISON,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA**

**BRIEF OF THE RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

HAROLD TRAVIS LYONS,
Petitioner,

vs.

WARDEN, NEVADA STATE PRISON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

BRIEF OF THE RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Whether this Court should decline discretionary review in this matter in accordance with Rule 17.1 of the Rules of the Supreme Court.

A. Whether the Nevada Supreme Court erred in determining that there was no factual or legal basis demonstrated by petitioner for the grant of habeas relief based on ineffective counsel.

B. Whether the Nevada Supreme Court erred in determining that petitioner was not denied due process based upon the filing by the state of a supplemental information charging petitioner with being an habitual criminal three days prior to the entry of a plea of nolo contendere by petitioner.

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OPINIONS AND
JUDGMENTS DELIVERED BELOW

The petitioner, Harold Travis Lyons, seeks certiorari from this court to review the decision of the Supreme Court of Nevada reported in Warden, Nevada State Prison v. Lyons, 100 Nev. ___, 683 P.2d 504 (Adv.Op. 90, filed July 3, 1984) (reprinted in Appendix A at 1a in the Petition for Writ of Certiorari). The state supreme court reversed the grant of habeas corpus relief to petitioner by the lower state district court which is not officially reported. Lyons v. State of Nevada, No. C58393, Order Granting Writ of Habeas Corpus for Post-Conviction Relief (Nev. 8th Jud.Dist.Ct., filed July 7, 1983) (reprinted in Appendix A at 6a in the Petition for Writ of Certiorari). The Supreme Court of Nevada denied rehearing in an unreported decision on August 27, 1984.

JURISDICTIONAL STATEMENT
AND CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

The jurisdiction of this Court is invoked under section 1257(3) of Title 28 of the United States Code. The Petition for Writ of Certiorari has set forth the pertinent text of the constitutional and statutory provisions which may be implicated in this case. See U.S. Const. amend. IV; id., amend. V; id., amend. VI; id., amend. XIV, § 1. The seventh amendment is not involved here contrary to the assertion of petitioner. See also Nev.Rev.Stat. §§ 207.010, 465.080, 465.101 (1983).

STATEMENT OF THE CASE

In order for this Court to make a proper assessment of the propriety of certiorari in this action, respondent believes a fairly detailed review of the background of this case is necessary. Petitioner has claimed in habeas corpus proceedings that his pleas of nolo contendere to felony charges of slot cheating in the Nevada state courts were involuntary. How those pleas came about must be reviewed prior to turning to the state habeas proceedings. All of the facts stated herein are supported by the record which was before the Nevada Supreme Court.

A. Procedural History

1.) The Criminal Charges.--Petitioner was initially detained on July 28, 1979, at the MGM Grand Hotel and Casino in Reno,

Nevada after having been caught cheating at a slot machine by MGM Security Officers. Petitioner was indicted on September 19, 1979, by the Washoe County Grand Jury in Reno for the felonies of slot cheating and possession of a slot machine cheating device.¹ Petitioner retained attorneys Jerome Polaha and John Conner and, on October 11, 1979, petitioner pled not guilty to the felony offenses. On July 23, 1980, petitioner's attorney requested to be relieved as counsel based upon the fact that petitioner no longer desired the services of his attorney and, on July 11, 1980, new counsel, Mr. Kent Robison, entered his appearance as counsel for petitioner.

Petitioner was subsequently caught

¹ The proceedings arising out of this indictment will be referred to herein as the "MGM case."

slot cheating at the Hyatt Lake Tahoe Casino on May 23, 1980, and at the Harold's Club in Reno on June 16, 1980. Criminal informations against petitioner were filed for these felonies in Washoe County on November 7, 1980 and November 17, 1980, respectively.²

On November 28, 1980, a criminal information supplemental to the indictment was filed against the petitioner in the MGM case. That supplemental information charged petitioner with being an habitual criminal as defined in section 207.010 of the Nevada Revised Statutes. On December 1, 1980, the time set for trial on the MGM case charges, petitioner withdrew his not guilty plea and pled nolo contendere to

² The proceedings following these criminal charges will be referred to herein as the "Hyatt case" and "Harold's Club case" respectively.

both counts. The State of Nevada had agreed not to ask for more than ten years on the first count and to recommend concurrent time on count II if time was received on the second count. The state also agreed that it would dismiss the habitual criminal charge at the time of sentencing and would dismiss the charges of slot cheating in the Hyatt case and Harold's Club case. Petitioner was then canvassed as to his knowledge and the voluntariness of his plea. Sentencing was set for February 3, 1981.

On January 22, 1981, petitioner was arrested at the Sahara Hotel and Casino for slot cheating and was later charged.³ Petitioner failed to appear for sentencing on the MGM case on February 3. As a result, the charges against the petitioner

³ The proceedings following these charges will be referred to as the "Sahara case."

for the Hyatt and Harold's Club cases were not dismissed and trial dates were set. He again failed to appear on those dates set for trial. Petitioner was arrested in Florida, received bail, and failed to return on the date set in Florida. Petitioner was subsequently arrested in New Jersey and returned to Nevada.

Petitioner appeared on January 29, 1982, in the MGM case in Reno. At that time, petitioner and his attorney, Mr. Robison, requested that Mr. Robison be relieved as counsel. Petitioner claimed that his attorney coerced him into his plea. Counsel denied this in open court claiming that petitioner was lying. Another attorney, Chet Kafchinski, was appointed on February 4, 1982, to represent petitioner and he indicated his intent to file a motion to withdraw petitioner's original plea of nolo contendere. Never-

theless, on February 25, 1982, petitioner did not withdraw his plea in the MGM case as a part of a bargain involving the Sahara case. The state had agreed that the time received on the Sahara charges would be served concurrently with any time given in the MGM case. The court then sentenced the petitioner in accordance with the plea negotiations. Petitioner was subsequently arraigned on March 2, 1982, in the Sahara case. At that time, petitioner entered a plea of nolo contendere to the felony count of possession of a slot machine cheating device. In return for the plea, the state agreed to dismiss count II, not file an habitual criminal allegation or pursue the four failure-to-appear charges. The state would also recommend that any sentence received would run concurrent to the MGM sentence. Petitioner was then sentenced accordingly and the promises made by the

state were then fulfilled.

2.) State Habeas Proceedings.--On June 8, 1982, petitioner, while being housed at a state prison facility in Clark County, Nevada, filed a petition for writ of habeas corpus in the Eighth Judicial District Court of the State of Nevada in Las Vegas, County of Clark, Nevada. In his pro per petition of some thirty-seven pages, petitioner claimed that he was deprived of effective assistance of counsel in the MGM case in that his attorney, Kent Robison, failed to file motions to suppress evidence and statements of petitioner as petitioner had insisted and that Attorney Robison, in concert with the prosecutor, compelled petitioner to plead guilty. Petitioner also claimed that illegal evidence had been used to coerce his guilty plea in that the MGM Hotel security guard who seized petitioner searched and failed to advise peti-

tioner of his constitutional rights prior to interrogation. Finally, petitioner claimed that his plea had been obtained through duress when the habitual criminal allegation was filed three days before the scheduled jury trial. Petitioner claimed in one final sentence that his plea in the Sahara case had been similarly coerced.

An attorney was then appointed to represent petitioner and the petition was initially denied without an evidentiary hearing in September of 1982. Petitioner's appointed counsel then withdrew and petitioner filed a pro per motion for rehearing claiming that his appointed counsel had been derelict in his duties. Petitioner also filed a twenty-five page memorandum of points and authorities in support of his motion for rehearing.

The state district court eventually granted what appeared to be habeas relief

and petitioner's present counsel entered an appearance on behalf of petitioner in February of 1983. The state district court subsequently explained that it had not granted habeas relief but had only granted petitioner a hearing on his claims. After several hearings on procedural matters, an evidentiary hearing on petitioner's substantive claims was held on May 27, 1983. Petitioner presented no witnesses or testimony and the State of Nevada called petitioner's second counsel, Chet Kafchinski. Subsequently, on June 14, 1983, the state district court granted permanent habeas relief for petitioner based only "on the fact that [petitioner's] plea was not properly taken." Petitioner's counsel subsequently prepared an order granting habeas relief which was signed by the district court judge on July 7, 1983. The State of Nevada appealed the decision of

the district court to the Nevada Supreme Court. The Nevada Supreme Court reversed. Warden, Nevada State Prison vs. Lyons, 100 Nev. at ___, 683 P.2d at 504.

B. Statement of Facts

Unfortunately, petitioner has alleged facts in his Petition for Writ of Certiorari which are in no way supported by any of the record filed with the Nevada Supreme Court or the lower state court in the habeas proceedings. Respondent agrees that petitioner was detained by private hotel security guards at the MGM Grand Hotel and Casino in Reno after having been caught cheating a slot machine. Petitioner was also interrogated by casino security guards and slot cheating devices were found on petitioner and removed by the security officers. The grand jury transcripts present in the record before the state

courts demonstrated that state gaming agents arrived after petitioner had made statements and evidence was taken from him.

With regard to the habeas corpus proceedings at the state district court level, petitioner presented no evidence or testimony supporting his allegations that his pleas were not knowingly and voluntarily entered. On the otherhand, the State of Nevada presented the testimony of petitioner's second attorney, Chet Kafchinski, who stated that he had discussed with petitioner the possibility of petitioner withdrawing his nolo contendere plea in the MGM case. Mr. Kafchinski testified that he did not believe petitioner had grounds to withdraw his plea but that such a motion would be made if petitioner so desired. Petitioner was also informed by Mr. Kafchinski that he believed the plea bargain originally entered was a good one especially in

light of the fact that four charges for failure to appear could also be filed and that the habitual criminal charge would be filed against petitioner. There is no support for the allegations of fact made by petitioner in his petition before this Court as to what representations were made by Mr. Robison to petitioner.

SUMMARY OF THE ARGUMENT

This Court should decline to review the decision of the Supreme Court of Nevada. Petitioner's factual assertions of ineffective counsel are not supported by the record in the state habeas courts. The decision of the state supreme court rejecting independent claims of a defendant prior to a plea of nolo contendere is not in conflict with the decisions of this Court or federal appellate courts. Similarly, the Nevada Supreme Court correctly rejected other claims of petitioner that his counsel

was ineffective.

Petitioner has also claimed that his due process rights were violated when state prosecutors filed an habitual criminal allegation three days prior to the entry of petitioner's plea of nolo contendere to the felony charges. The decision of the Supreme Court of Nevada rejecting the claim is supported by the facts and is in accordance with the decisions of this Court.

REASONS FOR DENIAL OF THE
PETITION FOR A WRIT OF CERTIORARI

Respondent contends that a review of the decision of the Nevada Supreme Court would be an unnecessary expenditure of this Court's resources. The decision of the state supreme court is in accord with the decisions of this Court and federal and state appellate courts. See Sup.Ct.R. 17.1(b)-(c). Perhaps, more importantly, petitioner has made factual assertions

which are not supported by the record which would be before this Court should a review be undertaken.

A. The Claim of Ineffective Assistance of Counsel.

As stated previously, petitioner alleged in the state habeas court that he was denied the effective assistance of counsel when Mr. Robison failed to file motions to suppress evidence in the MGM case and compelled petitioner to plead no contest to the charges. The state habeas district court granted relief in spite of the fact that petitioner had presented absolutely no evidence or testimony regarding the circumstances. This ruling was also in spite of the fact that the state had argued that petitioner's plea of nolo contendere was a waiver of all constitutional claims based upon events occurring

prior to the entry of that plea. The Supreme Court of Nevada agreed in its decision that petitioner's substantive fourth amendment claim was not cognizable for this reason. Warden v. Lyons, 100 Nev. at ___, 683 P.2d at 505.

Petitioner erroneously contends that the decision of the Nevada Supreme Court is in conflict with the decision of the Eighth Circuit Court of Appeals. Petitioner cites the case of United States v. Easter, 539 F.2d 663 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977), in support of his claim that the failure of defense counsel to file a pretrial motion to suppress evidence constitutes ineffective assistance of counsel. Petitioner fails to note that, in Easter, the attack of the conviction on direct appeal was not precluded because the defendant had been convicted following a jury trial and did not waive his fourth amend-

ment constitutional claims by entering a plea of guilty or nolo contendere.

The decision of the Supreme Court of Nevada is in accord with the decisions of this Court which preclude defendants who have pled guilty from thereafter raising independent claims relating to the deprivation of constitutional rights occurring prior to the entry of a guilty plea. Tollett v. Henderson, 411 U.S. 258, 267 (1973). See also McMann v. Richardson, 397 U.S. 759 (1970). The Nevada Supreme Court has previously rendered similar decisions relying on the decisions of this Court. See A Minor v. State, 99 Nev. 845, 673 P.2d 493 (1983); Cline v. State, 90 Nev. 17, 518 P.2d 159 (1974).

It can also be seen that the Nevada Supreme Court stated in a footnote in its decision that petitioner's counsel was not ineffective for failing to file a suppress-

sion motion and that, even had a suppression motion been made on behalf of petitioner, it would have been without merit under federal and state law. Warden v. Lyons, 100 Nev. at ___, 683 P.2d at 505-06 n.3, citing Burdeau v. McDowell, 256 U.S. 465 (1921); Radkus v. State, 90 Nev. 406, 528 P.2d 697 (1974). By citing these cases, the state supreme court determined that state agents were not involved in the search or interrogation of petitioner. As stated above, there was no factual support in the Nevada courts for petitioner's representations or inferences that state agents were involved.

Petitioner's second claim of ineffective counsel was that he was not advised that the charge contained in count II of the MGM case indictment was a lesser included offense of the charge contained in count I. Again, however, petitioner failed

to present any evidence that he was not so informed or that it prejudiced him. The certified copies of transcripts presented to the state habeas court demonstrated that the sentencing court stated in front of petitioner that the second count was a lesser included offense of count I. Secondly, and as noted by the Nevada Supreme Court, petitioner only received a sentence of ten years on the first count and a concurrent five-year term on the second count in the MGM case and a concurrent five years in the Sahara case. As such, petitioner does not have a valid claim of double jeopardy. Cf. Whalen v. United States, 445 U.S. 684 (1980) (federal court could not impose consecutive sentences for killing in the course of rape as Congress intended the rape to be a lesser-included offense). Even had petitioner received consecutive sentences, cumulative

punishment might be appropriate if authorized by the state legislature. See Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981).

Petitioner has claimed no other bases for alleging ineffective counsel. Nevertheless, petitioner contends that the Nevada Supreme Court should have analyzed his claims in accordance with five factors enumerated by this Court in United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039 (1984), and that a review of the Nevada Supreme Court's decision is necessary to avoid a gross miscarriage of justice in this case. Petitioner is apparently referring to the reference by this Court to the factors listed by the opinion of the court of appeals from which the case originated. But those factors have nothing to do with the conclusory and specific claims alleged

by petitioner in the state habeas court in this action. See id. at ___, 104 S.Ct. at 2049-51. The Nevada Supreme Court did review the various claims of ineffective counsel and concluded that counsel was not ineffective under Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). The only gross miscarriage of justice in this case is that the state habeas court granted relief to petitioner even though petitioner failed to present any evidence or legal basis for such relief.

B. Habitual Criminal Charge

Petitioner also claimed that he was denied due process and that his pleas of nolo contendere were rendered involuntary due to what petitioner termed the "last minute filing of the supplemental information charging him with being an habitual criminal." As the facts above demonstrate,

the habitual criminal allegation was filed after petitioner had been arrested two more times on slot cheating charges after his original arrest in the MGM case. The Nevada Supreme Court has previously held that a guilty plea is not coerced merely because it is motivated by a desire to avoid the possibility of a higher penalty.

Schoultz v. Warden, 88 Nev. 135, 139, 494 P.2d 274, 276 (1972), citing Brady v. United States, 397 U.S. 742 (1970). See also Stocks v. Warden, 86 Nev. 758, 476 P.2d 469 (1970).

Petitioner seemingly also contends that the prosecutor was vindictive and that this Court should reassess its holding in Bordenkircher v. Hayes, 434 U.S. 357 (1970). Petitioner has only made the bald, unsupported assertion that the Bordenkircher holding "has sanctioned widespread prosecutorial abuse in plea bargaining

. . . ." As with most of his other assertions, petitioner has no factual support in the record for his assertion. The facts of this case as indicated above also indicate that petitioner's new arrests may have prompted the prosecutor to file the habitual criminal charge. In any event, petitioner failed to make any record of his actual fears regarding the habitual criminal charge before he entered his nolo contendere plea. That is exactly the finding of the Nevada Supreme Court which also found that petitioner "gave no indication of any feeling of coercion at the MGM plea canvass" Warden v. Lyons, 100 Nev. at ___, 683 P.2d at 505.

CONCLUSION

The rules of practice of this court provide that certiorari review of judgments from a state court may be appropriate when the state court has rendered a decision in

conflict with decisions of another state court or federal court of appeals or when the state court has rendered a decision on an important question of federal law which should be settled by this Court or which is in conflict with applicable decisions of the Court. Sup.Ct.R. 17.1(b)-(c). As noted above, petitioner has totally failed to demonstrate the existence of a conflict between the decision of the Nevada Supreme Court and the decision of any other state or federal appellate court. In fact, it has been demonstrated that the decision of the Nevada Supreme Court was in accord with the decisions of this Court. Based upon the absence of factual support for petitioner's claims and based upon the fact that petitioner has failed to demonstrate a conflict between a decision of the Nevada Supreme Court and other case authority, this Court should decline discretionary

review of the judgment of the Supreme Court
of Nevada.

DATED: March 6, 1985.

Respectfully submitted,

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